Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1899

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, PETITIONER

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether a district court, sitting as a railroad reorganization court under Section 77 of the pre-1978 Bankruptcy Act, 11 U.S.C. 205, may decline to transmit a reorganization plan to the Interstate Commerce Commission on the basis of its determination that the plan is not feasible.

2. Whether such a railroad reorganization court has the power to order liquidation of the railroad.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Boston & Maine Corp., In re, 484 F. 2d 369 4

Ecker v. *Western Pacific R.R.*, 318 U.S. 448 ..... 4, 6

Lehigh Valley R.R., In re, 558 F. 2d 137 5

New Haven Inclusion Cases, 399 U.S. 392 5

Statutes and rule:

Bankruptcy Act:

Section 77, 11 U.S.C. 205 ..... 1-2, 3, 4, 5
Section 77(b), 11 U.S.C. 205(b) 5
Section 77(d), 11 U.S.C. 205(d) 2, 5

Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.* 2, 3, 5

Pub. L. No. 95-598, 92 Stat. 2683, Section 403 (prec. 11 U.S.C. (Supp. III) 101 note) 2

11 U.S.C. (Supp. III) 1170 4

Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 915 4

Bankruptcy Rule 8-303 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1899

RAILWAY LABOR EXECUTIVES' ASSOCIATION, PETITIONER

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not reported. The opinion of the district court (Pet. App. 19a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1981. The petition for a writ of certiorari was filed on May 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1975, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") filed a petition for reorganization in the United States District Court for the Northern District of Illinois under Section 77 of the old Bankruptcy

Act, 11 U.S.C. 205.[1] In 1979, the Trustee of the Rock Island filed with the reorganization court a plan of reorganization that contemplated continued operation of a greatly reduced core railroad. Before forwarding the plan to the Interstate Commerce Commission, the court commissioned a study of the plan by an independent consultant (Pet. App. 4a).[2] The consultant concluded that the core operation proposed in the plan was not viable (*ibid.*). Based on its review of the consultant's report, the reorganization court directed the Trustee not to forward the reorganization plan to the Commission because it had "no hope of success" (*id.* at 21a). The court then instructed the Trustee to prepare and file a preliminary plan of liquidation (*id.* at 22a).

The court of appeals affirmed in an unpublished order (Pet. App. 1a-15a).[3] The court rejected petitioner's contention that a reorganization court "has no discretion whatsoever to aid in the efficient management contemplated by [Bankruptcy] Rule 8-303 by refusing to transmit a manifestly unfeasible plan to the ICC" (*id.* at 10a). In addition, the court of appeals emphasized that the reorganization court did not circumvent Commission involvement in either the reorganization or the liquidation process, noting that the Commission subsequently authorized the abandonment

---

[1]Section 77 has been repealed by the Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.* The former Section 77 still governs cases commenced under that section before the effective date of the new code, such as the Rock Island bankruptcy at issue here. See Section 403 of Pub. L. No. 95-598, 92 Stat. 2683 (prec. 11 U.S.C. (Supp. III) 101 note). Unless otherwise indicated, all references herein will be to the old Bankruptcy Act.

[2]Bankruptcy Rule 8-303 requires the court to retain a plan of reorganization for not less than 30 days before transmitting it to the Commission for consideration (Pet. App. 44a), and Section 77(d), 11 U.S.C. 205(d), contemplates a Commission proceeding to consider the transmitted plan (Pet. App. 41a-42a).

[3]The United States and the Commission did not participate in the appeal.

of all of the Rock Island's lines because there was no realistic hope for reorganization or continued service (Pet. App. 11a). The court of appeals also held that liquidation may appropriately be undertaken in connection with a railroad reorganization under Section 77 (*id.* at 12a-14a).

ARGUMENT

1. Petitioner contends (Pet. 11-17) that the reorganization court's failure to forward the reorganization plan to the Commission violated Section 77. Whatever the merits of this contention, it does not merit review by this Court because no practical purpose would be served thereby. The liquidation of the Rock Island has not been stayed during the appellate proceedings in this case, and even petitioner admits (Pet. 12) that, in light of the progress of the liquidation, there is now little prospect that the Rock Island will ever resume its own operations. Requiring the Trustee now to forward its reorganization plan to the Commission would be a futile exercise.

Moreover, the issue of statutory interpretation presented here is of no continuing importance because of the repeal of Section 77. All railroad reorganizations filed in the future are subject to the rules of the Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.*, which does not require submission of a reorganization plan to the Commission. Thus, there are only two pending proceedings under Section 77, which were initiated before the effective date of the new Bankruptcy Act, in which this issue could possibly arise.[4]

---

[4] *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, No. 77-B-8999 (N.D. Ill.); *In re Boston & Maine* Corp., No. 70-250-M (D. Mass). Liquidation has already commenced in another Section 77 proceeding following approval of the Trustee's plan of liquidation by both the Commission and the reorganization court. *In re New York, Susquehanna & Western R.R.*, No. B-76-182 (D.N.J.).

In any event, petitioner's contention (Pet. 16-17) that *Ecker* v. *Western Pacific R.R.*, 318 U.S. 448 (1943), implies that the reorganization court infringed the Commission's jurisdiction by not forwarding the reorganization plan is mistaken. In *Ecker*, this Court concluded that the former Bankruptcy Act divided the power to reorganize railroads between the bankruptcy courts and the Commission. But here the reorganization court's action did not usurp the Commission's powers because the Commission did not dispute that there was no hope for a reorganization of the Rock Island. In May 1980, in response to the Trustee's abandonment application, the Commission determined that " 'abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity' " (Pet. App. 6a). For this reason, the Commission did not oppose the reorganization court's determination that the reorganization plan was without merit.[5] Moreover, the Commission's role, contemplated in *Ecker*, of protecting the public interest will be maintained here by the Commission's review of the liquidation plan and supervision of the liquidation process.[6]

---

[5]After the Commission recommended abandonment in May 1980, the reorganization court authorized the abandonment. While formerly only the Commission could authorize rail line abandonments, Section 17 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 915, provided that pending Section 77 railroad reorganizations will be subject to the provision of the new Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 1170, allowing courts to authorize abandonment of lines of bankrupt railroads after obtaining a report from the Commission.

[6]*In re Boston & Maine Corp.*, 484 F. 2d 369 (1st Cir. 1973), does not necessarily conflict with the decision of the court below. In *Boston & Maine*, the court of appeals specifically noted (*id.* at 372) that it could not say "that the prospects of reorganization [were] so dim" that the reorganization court could decide on its own whether a railroad could be reorganized. In contrast to the instant case (see pages 2-3, *supra*), the Commission there was of the view that the railroad could be reorganized successfully.

2. Petitioner contends (Pet. 18-19) that the reorganization court had no authority to order liquidation of the Rock Island because authority to liquidate railroads is conferred on such courts only by the Bankruptcy Act of 1978, 11 U.S.C. (Supp. III) 101 *et seq.*, not Section 77. This argument highlights the lack of future significance of the questions presented here. Moreover, the court of appeals correctly held that Section 77 contemplates liquidation as a form of reorganization.

Section 77(b), 11 U.S.C. 205(b), explicitly provides that a court may order, subject to the approval of the Commission, the "sale of all * * * the property of the debtor" railroad (Pet. App. 32a). This section clearly contemplates the possibility that the railroad will not be reorganized. See *New Haven Inclusion Cases*, 399 U.S. 392, 420 (1970). Thus, it has generally been recognized that a liquidation may proceed under Section 77 once it has been determined that a railroad is not reorganizable on an income basis. See generally *In re Lehigh Valley R.R.*, 558 F. 2d 137, 141-147 (3d Cir. 1977).[7] The decision of the court of appeals facilitates an orderly process for the liquidation of the Rock Island subject to the supervision of the Commission under former Section 77(d) of the Bankruptcy Act—a process that has previously been found to be workable in the Section 77

---

[7]Contrary to petitioner's suggestion (Pet. 20), no court has held that liquidation under Section 77 may proceed only if it is clear that the bulk of the railroad's property will continue in railroad use. The amount of property that will continue in railroad use is necessarily a function of whether willing purchasers exist, a factor that ought not affect a court's authority under Section 77. In any event, petitioner's concern (see Pet. 14) that the Rock Island's property will not be continued in rail use is premature. Since the reorganization court authorized the Rock Island to abandon all of its lines in June 1980, several railroads have filed with the Commission for permission to purchase and operate some of the abandoned lines; thus, much of the Rock Island's property may indeed continue to be used as a railroad in the future.

proceeding of the New York, Susquehanna and Western Railroad Company. See note 4, *supra*. This process is fully in accord with this Court's decision in *Ecker* v. *Western Pacific R.R., supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission

JUNE 1981

DOJ-1981-06